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# United States Magistrates Hearing Civil Cases: The Constitutionality of Rendering Final Judgments after Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

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## NOTES

### United States Magistrates Hearing Civil Cases: The Constitutionality of Rendering Final Judgments After *Northern Pipeline Construction Co. v.* *Marathon Pipe Line Co.*

The 1979 amendment to the United States Magistrates Act<sup>1</sup> is the latest and most liberal expansion of the federal magistrates' judicial powers, for it permits a magistrate to render final judgments in civil cases. This procedure reduces litigation costs and thereby increases access to the federal courts, especially for the disadvantaged.<sup>2</sup> A recent Supreme Court decision, however, places in controversy the constitutionality of the magistrate civil trial. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>3</sup> the Court ruled that certain final judgments of the federal bankruptcy courts were beyond the constitutional powers of non-article III courts.<sup>4</sup> Since *Marathon*, the circuit courts of appeals have questioned the constitutionality of non-article III federal magistrates rendering final judgments in civil cases.<sup>5</sup> The courts are finding *Marathon* inapplicable and the magis-

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1 Pub. L. No. 96-82, § 2, 93 Stat. 643 (codified at 28 U.S.C. § 636(c) (Supp. V 1981)).

2 See S. REP. NO. 74, 96th Cong., 1st Sess. 1, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 1469 [hereinafter cited as *1979 Senate Report*]. The purpose of the 1979 amendment was to "further clarify and expand the jurisdiction of United States Magistrates and improve access to the Federal courts for the less-advantaged." *Id.* The amendment was part of a larger congressional scheme:

The Magistrates bill is one in a series of Court reform bills that the committee will consider this Congress. The committee's permeating policy in all these bills will be to bring about a judiciary of the highest quality that can deliver speedy, but reasoned, justice and a system that provides the opportunity for access to the judicial forum for all Americans.

*Id.*

3 458 U.S. 50 (1982). For further discussion of *Marathon*, see notes 48-70 *infra* and accompanying text.

4 458 U.S. at 88.

5 See notes 71-112 *infra* and accompanying text. The present situation was foreseen in C. WRIGHT, THE LAW OF FEDERAL COURTS 49-50 (4th ed. 1983):

There have been questions of the extent to which the judicial power of the United States may validly be exercised by United States magistrates, who serve for an eight-year term, and these questions have been sharpened by 1979 amendments to the Magistrates' Act enlarging the powers of magistrates. These questions will now have to be examined in light of the Court's 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, in which the Court again struggled with the

trate civil trial constitutional.<sup>6</sup> Some opinions, however, state that *Marathon* is controlling precedent and that the 1979 amendment violates article III.<sup>7</sup>

This Note argues that *Marathon* is not controlling and that the magistrate civil trial is constitutional. Part I surveys the state of the law, discussing the institutional values embodied in article III, the purposes and powers of the federal magistrate, and recent decisions concerning the constitutionality of the magistrate civil trial. Part II argues that *Marathon* does not pertain directly to the present issue, and since the 1979 amendment adequately addresses article III concerns, the magistrate civil trial is constitutional. Part III proposes several modifications that may improve the magistrate civil trial and preserve the procedure, should the Supreme Court hear the issue and find the present amendment unconstitutional.

## I. The State of the Law

The separation of powers and the independence of the federal judiciary are fundamental principles of American government incorporated into article III of the Constitution.<sup>8</sup> The integral role of article III in safeguarding these institutional values was emphasized by the Framers, and has been continually reaffirmed by the Supreme Court.<sup>9</sup>

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metaphysics of "constitutional" and "legislative" courts, this time in the context of bankruptcy courts.

6 See notes 71-112 *infra* and accompanying text.

7 The issue continues to arise in the circuits and may eventually come before the Supreme Court. See notes 71-78 and 86-90 *infra* and accompanying text.

8 See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 135-37 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15-19, 49-50 (1978). "Certainly, the constitution does provide for an independent judiciary, by granting article III judges a fixed salary and life tenure, and by making congressional removal, at least, quite difficult." *Id.* at 49. See notes 10, 11 *infra* for the pertinent text of article III.

9 See THE FEDERALIST NO. 47 (J. Madison) on the importance of the separation of powers in the American scheme of government; THE FEDERALIST NO. 78 (A. Hamilton) on the tenure provision of article III as a protection for the independence of the federal judiciary, a theme repeated in the subsequent paper on the compensation provision:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter [emphasis in original].

THE FEDERALIST NO. 79, at 512 (A. Hamilton) (Modern Library ed. 1941). For recent pronouncements by the Supreme Court on the separation of powers and the independence of the federal judiciary, see *Buckley v. Valeo*, 424 U.S. 1 (1976); on checks and balances in general, see *United States v. Will*, 449 U.S. 200 (1980), in which the Court stated:

Article III establishes a specialized tribunal vested with the judicial power of the United States, which consists primarily of jurisdiction over cases arising under the Constitution and federal law, and over controversies between citizens of different states.<sup>10</sup> The basic characteristics of an article III judgeship are life tenure and undiminishable compensation.<sup>11</sup> Cloaked with these protections, article III judges remain independent of the other branches of the federal government, of the state governments, and of influential private individuals.<sup>12</sup> Such independence is crucial for judicial impartiality and free development in legal thought.<sup>13</sup> It also inspires public confidence in the judiciary and attracts highly qualified candidates for federal judgeships.<sup>14</sup> With few exceptions, litigants in federal court have the due process right to bring their civil suits before this special-

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A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government. Our Constitution promotes that independence specifically [in article III, § 1].

449 U.S. at 217-218. *Marathon* contains the Court's most recent assertions on the importance of article III in the government structure:

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. . . . [The provisions of article III] were incorporated into the Constitution to ensure the independence of the judiciary from control of the executive and legislative branches of government.

458 U.S. at 58-59.

10 U.S. CONST. art. III, §§ 1, 2, cl. 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* § 1.

11 U.S. CONST. art. III, § 1. "The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." *Id.*

12 See generally Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 583-85 (1980) (discussing the protection that the tenure and compensation provisions of article III offer against encroachments by state governments and private parties).

13 See generally *id.* The benefits of article III protection were also discussed by the Supreme Court in *Marathon*:

These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations. . . . The security that they provide to members of the Judicial Branch helps to attract well-qualified persons to the federal bench. . . . The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism.

458 U.S. at 59 n.10. The original insight, however, dates back to Hamilton, see THE FEDERALIST NO. 78 (A. Hamilton).

14 See Note, *supra* note 12, at 583-85.

ized, protected judicial body.<sup>15</sup>

The Constitution, however, does not mandate that the judicial power of the United States be vested exclusively in article III courts.<sup>16</sup> When strict adherence to the tenure and compensation requirements of article III would unnecessarily hinder governmental flexibility, Congress has vested judicial powers in non-article III federal courts.<sup>17</sup> Traditional examples of these legislative courts include the federal tax, military, territorial, and administrative courts.<sup>18</sup> The federal magistrate is a more recent instance, established by Congress

15 The Supreme Court has not declared that litigants in all types and stages of cases brought in federal court have the absolute right to an article III tribunal. Instead, due process demands a "hearing appropriate to the nature of the case." *United States v. Raddatz*, 447 U.S. 667, 677 (1950) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). This right usually, but not always, is a hearing before an article III judge. *Glidden v. Zdanok*, 370 U.S. 530 (1962); *Palmore v. United States*, 411 U.S. 389 (1973) (Douglas, J., dissenting). Article III protections exist as much for the sake of the litigants as the judge. See Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 690 (1979); see also *Pacemaker Diagnostic Clinic v. Instromedix Inc.*, 724 F.2d 537, 541 (9th Cir. 1984).

16 See C. WRIGHT, *supra* note 5, at 39-52 (discussing the historical development of the legislative court). After quoting article III, § 1, Wright states:

This would seem to be a very clear declaration that the judicial power, as defined in the following section of Article III, can only be conferred on courts where the judges enjoy tenure for good behavior, and assurance against diminution in salary, protections that the Framers, and all succeeding generations, have thought of vital importance in preserving judicial independence. . . . The historical development, however, has been much more complicated than these seemingly obvious propositions would suggest.

*Id.* at 39-40. Professor Wright concludes that from the 19th century to the present, the state of the law has been conflicting and contradictory. *Id.* at 52. Chief Justice Marshall broke the ground for legislative courts in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). The Supreme Court has since found that Congress is not required to vest the judicial power of the United States in article III courts alone, and that article I courts are valid under the necessary and proper clause. See *Swain v. Pressely*, 430 U.S. 372 (1977); *Palmore v. United States*, 411 U.S. 389 (1973); *Glidden v. Zdanok*, 370 U.S. 530 (1962); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

17 See generally Note, *supra* note 12, at 570; H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 396 (2d ed. 1973).

18 See C. WRIGHT, *supra* note 5, at 39-52; *The Federal Magistrates Act of 1979: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 71 (1979) (statement of Daniel J. Meador, Assistant Attorney Gen., Justice Dep't) [hereinafter cited as *1979 Senate Hearing*]. Mr. Meador argued for the 1979 amendment to the Magistrates Act by analogy to these legislative courts:

Based on both history and authority, it is inaccurate to say that every article III controversy must be decided at every state only by an article III judge. There are numerous instances, in the past and present, where non-article III forums enter binding judgments in article III cases. Large amounts of article III business are handled by the territorial courts, the U.S. Courts of Military Appeals, the Tax Courts of the United States, the courts of the District of Columbia, and the State courts, all of which are non-article III forums.

*Id.* In *Marathon*, Justice Brennan recognized these three article I courts as legitimate excep-

under article I as an adjunct of the district court.<sup>19</sup> The current question presented to the circuits is whether the magistrate is a legislative judge constitutionally capable of exercising full judicial powers. The answer requires an examination of the purposes and powers of the federal magistrate.

The magistrate descends from the United States commissioner, a judicial officer dating from the nineteenth century.<sup>20</sup> The commissioner assisted the district court in discharging its more perfunctory duties and represented the court in rural areas.<sup>21</sup> The status and jurisdiction of the commissioner were inadequate, however, and by the mid-twentieth century the office was clearly antiquated.<sup>22</sup> In 1968, Congress replaced the commissioner with the present United States magistrate.

The 1968 Magistrates Act<sup>23</sup> conferred upon this new judicial officer all former duties of the commissioner together with a more permanent status and expanded jurisdiction in order to "reform the first echelon of the federal judiciary into an effective component in the modern scheme of justice."<sup>24</sup> The magistrate is the district court's principle adjunct, assisting with a variety of judicial tasks. Therefore, Congress designed the magistrate to be a flexible, innovative

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tions to the general rule that the judicial power of the United States must vest in an article III court. 458 U.S. at 64-70; see notes 60-62 *infra* and accompanying text.

19 The United States Court of Appeals for the First Circuit in *DeCosta v. Columbia Broadcasting Co.*, 520 F.2d 499 (1st Cir. 1974), *cert. denied*, 423 U.S. 1073 (1975), stated that "[a] magistrate is an article I judge, being a 'tribunal inferior to the Supreme Court' and appointed pursuant to the Congressional power under U.S. Const. Article I, Sec. 8, clause 9." 520 F.2d at 503 n.3. The article I status of the federal magistrate was emphasized by Congress in evaluating the constitutionality of the magistrates' jurisdiction. See *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 106-09 (1977) (statement of Hon. Joseph D. Tydings) [hereinafter cited as *1977 House Hearings*]. But see note 61 *infra*. For a treatment of the status and history of the federal magistrate, see Spaniol, *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565; McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979).

20 The commissioners were appointed and removed by the district courts and served four year terms. They were compensated on a fee schedule, and there was no bar membership requirement. See Spaniol, *supra* note 19, at 566; McCabe, *supra* note 19, at 345-47.

21 See McCabe, *supra* note 19, at 345-47.

22 See *Hearings on the U.S. Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 29th Cong., 1st & 2d Sess. pt. I, at 1 (1965-66); H.R. REP. NO. 1629, 90th Cong., 2d Sess. 1, reprinted in 1968 U.S. CODE CONG & AD. NEWS 4252 [hereinafter cited as *1968 House Report*]; McCabe, *supra* note 19, at 345-47.

23 Pub. L. No. 90-578, § 101, 82 Stat. 1113 (current version at 28 U.S.C. §§ 631-37 (Supp. V 1981)).

24 *1968 House Report*, *supra* note 22, at 11.

instrument under district court control.<sup>25</sup> The magistrate, accordingly, serves either full or part time<sup>26</sup> with a limited term<sup>27</sup> and adjustable salary.<sup>28</sup> The district judges have the power of appointment<sup>29</sup> and dismissal,<sup>30</sup> and issue the rules under which the magistrates operate.<sup>31</sup> These non-article III characteristics allow each district to tailor the magistrate to the court's particular needs. In fulfilling these needs, the district judges have uniformly increased their magistrate's judicial powers.<sup>32</sup>

25 *Id.* at 19; S. REP. NO. 371, 90th Cong., 1st Sess. 25 (1967).

26 28 U.S.C. § 631(c) (Supp. V 1981).

27 *Id.*

28 "[T]he Salary of a full-time United States Magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term." 28 U.S.C. § 634(b) (Supp. V 1981). Therefore Congress can lower a magistrate's compensation, but not below his original salary.

29 The Judicial Conference determines the number of magistrates per district, 28 U.S.C. § 633(b) (Supp. V 1981), and sets the standards for magistrate selection, 28 U.S.C. § 631(b)(5) (Supp. V 1981). The district judges appoint the magistrate, and if there is no concurrence, the chief district judge makes the appointment. 28 U.S.C. § 631(a) (Supp. V 1981). The appointee, in addition to complying with the standards set by the Judicial Conference, must be: a member of the state bar for at least five years if he is to be a full time magistrate, 28 U.S.C. § 631(b)(1) (Supp. V 1981); competent to serve, 28 U.S.C. § 631(b)(2) (Supp. V 1981); not related by blood or marriage to a judge of the appointing court, 28 U.S.C. § 631(b)(3) (Supp. V 1981); not a holder of another civil or military office (with the exception of part time bankruptcy judges-magistrates, and court clerk-magistrates), 28 U.S.C. § 631(c) (Supp. V 1981); and not 70 years or older at time of initial appointment. 28 U.S.C. § 631(e) (Supp. V 1981). The magistrate takes an oath of office, 28 U.S.C. § 631(g) (Supp. V 1981), and can be reappointed by the district court if approved by a majority of the district judges and the judicial conference of the circuit, 28 U.S.C. § 631(f) (Supp. V 1981). A full-time magistrate cannot engage in legal practice, and the practice of a part-time magistrate cannot conflict with his official duties, 28 U.S.C. § 632 (Supp. V 1981).

30 A magistrate may be removed by the district court for a variety of non-impeachable offenses:

Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate serves. . . . Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council or councils an opportunity to be heard on the charges.

28 U.S.C. § 631(i) (Supp. V 1981).

31 28 U.S.C. § 636(b)(4) (Supp. V 1981).

32 See McCabe, *supra* note 19, at 356-61; see also 1979 Senate Report, *supra* note 2, at 2-4 which states:

The Magistrate system became fully operational nationwide in 1971. During the intervening 8 years, the district courts have called upon the assistance of these judicial officers to an increasing extent. In those 8 years, the district courts have been

By the 1979 amendment,<sup>33</sup> the magistrate had acquired extensive duties in both criminal and civil cases. In the criminal area, these duties extended to jurisdiction over minor criminal cases.<sup>34</sup> In the civil area, the magistrate's responsibilities included determining certain pre-trial matters,<sup>35</sup> conducting evidentiary hearings,<sup>36</sup> serving as a special master,<sup>37</sup> and performing "any other duty not inconsistent with the laws and Constitution of the United States."<sup>38</sup> This last provision was the vehicle for district court experimentation with the magistrate, eventually leading to the 1979 amendment.

The magistrate civil trial amendment validated the practice of more than half the district courts,<sup>39</sup> explicitly authorizing the magistrate to render final judgments in any case within the district court's civil jurisdiction.<sup>40</sup> Congress intended this procedure to increase access to the federal court system, especially for those least equipped to absorb the delay and expense of federal litigation, and to reduce the caseload of the district judges.<sup>41</sup> The amendment sets forth two pre-

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able to substantially increase their caseload disposition rate (from 315 per judge to 388 per judge), thanks in large part to the assistance provided by U.S. magistrates.

33 28 U.S.C. § 636(c) (Supp. V 1981).

34 The magistrate has jurisdiction only upon the consent of the defendant. 18 U.S.C. § 3401 (1982) and 28 U.S.C. § 636(a)(3) (Supp. V 1981).

35 28 U.S.C. § 636(b)(1)(a) (Supp. V 1981).

36 28 U.S.C. § 636(b)(1)(b) (Supp. V 1981).

37 28 U.S.C. § 636(b)(3) (Supp. V 1981).

38 28 U.S.C. § 636(b)(3) (Supp. V 1981).

39 McCabe, *supra* note 19, at 365; 1979 Senate Report, *supra* note 2, at 4.

40 The statute states:

Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

28 U.S.C. § 636(c)(1) (Supp. V 1981). The Senate Report elaborates:

The magistrate is empowered to determine the issues of law and the questions of fact in the case and to direct the clerk of the district court to enter a final judgment disposing of the litigation. The grant of jurisdiction is limited by the requirement that the district judges approve the magistrate's exercise of the authority. This will enable the court to assure itself that an individual magistrate is fully qualified to try such cases and that the magistrate's performance of his other duties will not be unduly impeded.

1979 Senate Report, *supra* note 2, at 13. Congress rejected the proposal that the magistrate be empowered to hear and decide only certain types of cases, reasoning that all litigants should have equal opportunity to take advantage of the new procedure, and desiring to avoid any subtle coercion. *Id.*

41 1979 Senate Report, *supra* note 2, at 1; 1979 Senate Hearing, *supra* note 18, at 1 (remarks of Sen. Dennis DeConcini, Senate Judiciary Comm.):

The purpose of the bill is to expand the civil and criminal jurisdiction of our Federal magistrates to enable speedier justice and greater access to the courts. . . . The



requisites, however, for a trial by magistrate: district court designation of the magistrate to hear civil cases,<sup>42</sup> and the voluntary consent of the litigants.<sup>43</sup> When these requirements are fulfilled, the magistrate may hear the case and render a binding judgment.<sup>44</sup> The district court, however, retains the power to vacate the reference for good cause.<sup>45</sup> Once the magistrate renders judgment, the parties may further accelerate the judicial process by foregoing the traditional appellate route and appealing directly to the district court which reviews the case on the record.<sup>46</sup> The court of appeals has the option to extend a second appeal.<sup>47</sup>

Under this system, the magistrates have decided civil suits for

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Magistrates Act is part of a comprehensive package legislation supported by the chairman of this committee, the Attorney General and President Carter. . . . The first step in the process was getting more Federal judges, and that effort culminated with the passage of the omnibus judgeship bill. . . .

The Second step is to be enactment of the Magistrates Act, legislation that will provide greater flexibility to the judicial system by allowing civil cases and minor criminal cases to be tried before a magistrate if the parties consent. With magistrates handling these matters as well as many motions, conducting arraignments, and presiding at pre-trial conferences, the valuable time of life tenure article III judges will be conserved and better put to use on the more momentous issues of constitutional interpretation for which they are best suited.

*Id.* at 1-2. See Rodino, *Magistrate Reform: A Way to Aid Congested Federal Courts*, 13 TRIAL, Oct.-Nov. 1977, at 32.

42 28 U.S.C. § 636(c)(1) (Supp. V 1981).

43 28 U.S.C. § 636(c)(1) (Supp. V 1981). The clerk of court obtains consent. The judge and magistrate cannot influence the decision:

[N]either the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

44 28 U.S.C. § 636(c)(1) (Supp. V 1981).

45 "The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection." 28 U.S.C. § 636(e)(6) (Supp. V 1981).

46 The parties may select the regular appellate route to the court of appeals. 28 U.S.C. § 636(g)(3) (Supp. V 1981). The new appellate procedure provides:

Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

28 U.S.C. § 636(c)(4) (Supp. V 1981). In all other uses of the magistrate in civil cases, the district court submits the magistrate's findings to a de novo determination. 28 U.S.C. § 636(b)(1) (Supp. V 1981). See also *United States v. Raddatz*, 446 U.S. 667 (1980); *Mathews v. Weber*, 423 U.S. 261 (1976).

47 28 U.S.C. § 636(c)(5) (Supp. V 1981).

the past several years. But the procedure may run counter to article III. *Marathon* heightens the possibility of constitutional conflict, for in that case the Supreme Court found unconstitutional a situation analogous to the magistrate civil trial. A preliminary discussion of *Marathon* is necessary to appreciate the recent circuit court decisions on the constitutionality of the magistrate civil trial.

The *Marathon* opinion generates conflicting interpretations due to the broad language of the Court's plurality opinion and the narrowness of its ultimate holding. The case arose from reorganization proceedings in the United States Bankruptcy Court for the District of Minnesota.<sup>48</sup> Pursuant to the new bankruptcy procedure,<sup>49</sup> the debtor filed a complaint directly in the bankruptcy court, seeking damages under state law for various contract claims.<sup>50</sup> A creditor filed a motion to dismiss for lack of subject matter jurisdiction,<sup>51</sup> and the court denied the motion.<sup>52</sup> The matter, as appealed through the circuits, centered upon section 1471 of the United States Code, in which Congress created the new bankruptcy courts.<sup>53</sup> While these courts were technically adjuncts of the district courts,<sup>54</sup> they operated independently and possessed a broad grant of jurisdiction.<sup>55</sup> In addition, the new bankruptcy procedure did not require litigant consent to a non-article III tribunal.<sup>56</sup>

The Supreme Court was sharply divided and did not produce a majority opinion.<sup>57</sup> The plurality, however, rejected the jurisdiction

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48 458 U.S. 50, 56 (1982). See C. WRIGHT, *supra* note 5, at 50-52; Levit & Mason, *Where Do We Go From Here? Bankruptcy Administration Post-Marathon*, 87 COM. L. J. 353 (1982), for a complete discussion of the *Marathon* holding and its ramifications for the federal court system.

49 28 U.S.C. § 1471 (Supp. V 1981)

50 458 U.S. 50, 56 (1982).

51 *Id.* at 56-57.

52 *Id.* at 57.

53 *Id.*

54 *Id.* at 53. The bankruptcy judges were officially adjuncts of the district court they served and had limited terms and flexible compensation, 28 U.S.C. § 151(a) (Supp. V 1981).

55 458 U.S. at 54-55, 84-87. The bankruptcy court, through the district court, exercised jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (Supp. V. 1981). The contract claims in *Marathon* were related to the general title 11 claim. The new bankruptcy courts were empowered with all "powers of a court of equity, law, and admiralty." 28 U.S.C. § 1481 (Supp. V 1981). Appeal could be taken to a panel of bankruptcy judges, the district court, or the court of appeals. 458 U.S. at 55.

56 This fact was emphasized by Chief Justice Burger, 458 U.S. at 92 (Burger, J., dissenting); see also note 114 *infra*.

57 The plurality opinion was written by Justice Brennan and joined by Justices Marshall, Blackmun and Stevens. 458 U.S. at 52.

granted to the non-article III federal bankruptcy court.<sup>58</sup> The four justices stressed the importance of article III in maintaining the separation of powers and independence of the federal judiciary.<sup>59</sup> They denied that Congress has the unlimited authority to establish legislative courts vested with full judicial powers.<sup>60</sup> Rather, such jurisdiction belongs to article III courts alone, with three exceptions: territorial courts, military tribunals, and administrative courts adjudicating public rights.<sup>61</sup> The bankruptcy court fits none of these exceptions.<sup>62</sup> The argument that the bankruptcy court could exercise full judicial powers as the district court's adjunct had some appeal to the plurality.<sup>63</sup> But they found the relationship between the bankruptcy court and the district court too attenuated; the bankruptcy court's rendering of final judgments<sup>64</sup> indicates that it, and not the district court, possesses "the essential attributes of judicial power."<sup>65</sup> Moreover, appellate review by an article III court does not justify this exercise of jurisdiction by a non-article III court.<sup>66</sup> The plurality thus concluded that the judicial powers granted to the federal bankruptcy court were unconstitutional.<sup>67</sup>

The two concurring justices did not adopt so comprehensive a

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58 *Id.* at 87, 89.

59 *Id.* at 57-60. *See* notes 8, 9 *supra* and accompanying text.

60 458 U.S. at 63-76.

61 *Id.* The plurality stated:

[W]hen properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that congressional assertion of power to create legislative courts was consistent with, rather than threatening to, the constitutional mandates of separation of powers.

*Id.* at 63-64. Under the pluralities' narrow definition of legislative court, the federal magistrate would be simply an adjunct. *Id.* at 63 n.13.

62 *Id.* at 76.

63 *Id.* at 76-87.

64 *Id.* at 83-87.

65 *Id.* at 87.

66 The plurality stated:

Our precedents make it clear that the constitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at trial level.

*Id.* at 86 n.39.

67 The plurality would, it appears, invalidate the entire grant of broad jurisdiction:

We conclude that 28 U.S.C. § 1471 (1976 ed. Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has

conclusion.<sup>68</sup> They agreed with the plurality only to the extent that bankruptcy judges could not constitutionally render final judgments in state-law based causes of action.<sup>69</sup> This much narrower conclusion forms the point upon which the majority of justices agreed, and is thus the holding of *Marathon*.<sup>70</sup> In the wake of *Marathon*, the circuit courts soon began to question the constitutionality of the magistrate civil trial.

The first case dealing with the issue was *Pacemaker Diagnostic Clinic v. Instromedix Inc.*,<sup>71</sup> ("Pacemaker I"). In *Pacemaker I*, a panel of the Court of Appeals for the Ninth Circuit decided that *Marathon* was

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vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

*Id.* at 87. The state-law jurisdiction is non-severable, and thus all of § 1471 is invalid. *Id.* at 87-88 n.40.

68 Justice Rehnquist wrote a separate concurring opinion in which Justice O'Connor joined. *Id.* at 89.

69 Justice Rehnquist stated:

I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night. . . . I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over *Marathon's* objection to be violative of Art. III of the United States Constitution.

*Id.* at 91 (Rehnquist, J., concurring). Justice White wrote a dissent in which Justice Powell joined. Chief Justice Burger wrote a separate dissent. Justice White argued that the judicial powers of article I courts are not so limited:

There is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of our precedents upholding a variety of Art. I courts—not to speak of those Art. I courts that go by the contemporary name of "administrative agencies"—this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in the *Federalist* Nos. 78-82. . . . Article III is to be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

*Id.* at 113 (White, J., dissenting). Justice White argued that even if the concurring Justices were correct concerning the bankruptcy court's jurisdiction over state-law based claims, the Court cannot presume that these provisions are not severable from the rest of § 1471:

The plurality attempts to justify its sweeping invalidation of § 1471, because of its inclusion of state-law claims, by suggesting that this statutory provision is non-severable. . . . The concurring Justices specifically adopt this argument as the reason for their decision to join the judgment of the Court. The basis for the conclusion of non-severability, however, is nothing more than a presumption. . . . I had not thought this to be the contemporary approach to the problem of severability, particularly when dealing with federal statutes.

*Id.* at 95-97 n.3.

70 *Id.* at 91-92 (Rehnquist, J., concurring).

71 712 F.2d 1305 (9th Cir. 1983), *withdrawn and reh'g granted*, 718 F.2d 971 (9th Cir. 1983), *rev'd*, 725 F.2d 537 (9th Cir. 1984) (en banc).

dispositive and that the magistrate civil trial was unconstitutional.<sup>72</sup> While the decision was later reversed,<sup>73</sup> the opinion represents the reasoning of those who argue that the new procedure runs counter to article III.

*Pacemaker I* was a patent infringement case in which the litigants consented to a magistrate civil trial under section 363(c) of the United States Code.<sup>74</sup> In light of the *Marathon* decision, the Ninth Circuit raised the constitutionality issue on its own motion,<sup>75</sup> and found *Marathon* controlling precedent for any grant of article III judicial power to a non-article III federal court.<sup>76</sup> The court reasoned that since the magistrate court fails to qualify under any of the three exceptions in *Marathon*, the ruling of *Marathon* applies and the magistrate cannot constitutionally render final judgments in civil cases.<sup>77</sup> Even though district court supervision of the magistrate and litigant consent are mitigating factors, the court found that these do not adequately protect the article III concerns stressed by the Supreme Court.<sup>78</sup>

The Ninth Circuit en banc withdrew this panel decision and reversed the holding ("*Pacemaker II*").<sup>79</sup> The majority concluded that close district court supervision of the magistrate court and the requirement of litigant consent overcome constitutional objections.<sup>80</sup> Under the statutory scheme, the responsibility for the administration

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72 712 F.2d at 1314.

73 725 F.2d 537 (9th Cir. 1984).

74 712 F.2d at 13.

75 *Id.* at 1308.

76 *Id.*

77 The crucial factor for the court was the magistrate's ability to render final and binding judgments. Such judicial power must be vested in article III courts alone; "[t]his is precisely the problem with 28 U.S.C. § 636(c). The magistrate makes the ultimate decision and enters a final judgment. Thus the provision cannot pass constitutional muster as authorizing an adjunct function of the district court." *Id.* at 1310.

78 The court stated:

The use of magistrates to conduct trials and enter final judgment implicates both due process and article III concerns. We recognize that a due process right may be waived voluntarily, but there is more at stake here than the litigants' due process right to a decision by an article III judge. We believe that the Constitution establishes a framework of government that cannot be altered by statute nor waived by litigant consent. The independence of the judiciary, the distribution of power, and the separation of powers are at stake here.

*Id.* at 1310.

79 725 F.2d 537, 547 (9th Cir. 1984).

80 The court upheld the constitutionality of the magistrate civil trial due to the judicial supervision of the magistrate system, the special control exercised by the district court over the magistrate civil trials, and the litigant consent requirement. *Id.* at 544-46. The court added that "[f]rom a realistic and practical perspective, reference of civil cases to magistrates

of justice remains with the district court even though the magistrate hears the case,<sup>81</sup> thus sufficiently protecting the separation of powers and independence of the federal judiciary.<sup>82</sup> If the magistrate trial were mandatory, it would violate constitutional rights.<sup>83</sup> But under section 636(c), no magistrate trial will ensue unless all parties freely and intelligently waive their due process right to an article III court.<sup>84</sup> The court stressed that this consent requirement distinguishes the present situation from cases limiting the constitutional powers of legislative courts.<sup>85</sup>

Three judges dissented, however, maintaining that the majority opinion disrupts the constitutional principles recently emphasized by the Supreme Court.<sup>86</sup> The procedure permits encroachment by the judiciary on the Congress and the President.<sup>87</sup> Moreover, the magistrate's dependence on the district court impairs freedom in decision-making.<sup>88</sup> Federal judges without article III protection must not, the dissenters argued, exercise the full judicial power of the United States.<sup>89</sup> One dissenting judge further urged that magistrates be made article III judges, if they must shoulder article III judicial responsibilities.<sup>90</sup>

In reaching their conclusion, the *Pacemaker II* majority was influenced by a Third Circuit decision, *Wharton-Thomas v. United States*.<sup>91</sup> In *Wharton-Thomas*, plaintiffs brought suit under the Federal Tort

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with the consent of the parties, subject to careful supervision by Article III judges, may serve to strengthen an independent judiciary, not undermine it." *Id.*

81 The court reasoned that the supervisory power of the district court "provides Article III courts with continuing, plenary responsibility of the administration of the judicial business of the United States. This responsibility sufficiently protects the judiciary from the encroachment of the other branches to satisfy the separation of powers embodied in Article III." *Id.*

82 *Id.*

83 *Id.* at 542.

84 *Id.*

85 *Id.*

86 The dissent stated:

The majority holds that, so long as the parties consent, the power to decide any federal civil case in the district courts of the United States may be exercised by individuals who occupy positions that Congress has not established, and who must depend both upon district judges for their tenure and upon Congress for their compensation. Because I believe this holding disrupts the proper operation of our constitutional system, including the independent exercise of judicial power by individuals free of outside constraints, I dissent.

*Id.* at 547 (Schroeder, J., dissenting).

87 *Id.* at 549-50.

88 *Id.* at 549.

89 *Id.* at 554-55.

90 *Id.* at 555 (Pregerson, J., dissenting).

91 721 F. 2d 922 (3d Cir. 1983).

Claims Act, and both parties consented to a magistrate trial.<sup>92</sup> In light of *Marathon* and *Pacemaker I*, the court of appeals raised the constitutionality issue sua sponte.<sup>93</sup> The Third Circuit disagreed with *Pacemaker I*, finding the *Marathon* holding too narrow to control the issue.<sup>94</sup> Focusing upon the magistrate's adjunct status and the requirement of litigant consent, the court ruled that the procedure does not substantially interfere with the structural principles behind article III.<sup>95</sup> Furthermore, the litigant consent requirement introduces supporting precedent unavailable in the bankruptcy court situation.<sup>96</sup> Although the court questioned the wisdom of conducting magistrate civil trials, it nonetheless found the amendment constitutional.<sup>97</sup>

The Second Circuit has reached the same conclusion in *Collins v. United States*.<sup>98</sup> *Collins* concerned a civil rights complaint in which the parties consented to a magistrate trial.<sup>99</sup> The magistrate found for the plaintiff, and the district court affirmed.<sup>100</sup> The court of appeals then exercised its option under section 636(c) and granted further appeal.<sup>101</sup> Citing *Pacemaker I*, the appellants argued that the magistrate civil trial violates article III.<sup>102</sup> The court's analysis

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92 *Id.* at 924.

93 *Id.* at 925.

94 *Id.* at 927.

95 "[T]he magistrate does not function independently of the district court, but as an integral part of it." *Id.* at 927.

96 The court concluded:

In sum, section 636(c) does not violate article III because:

1. The reference to a magistrate is consensual;
2. The district judge has the power to vacate the reference;
3. The magistrate is appointed by the district judges, is a part of the district court, and is specially designated to try cases;
4. The parties have a right of appeal to a district judge or the court of appeals.

We decline to follow the *Pacemaker* panel decision because it reads too much into *Northern Pipeline*. The distinctions between the magistrate system incorporated into the district court and the independent bankruptcy courts are such that *Northern Pipeline's* ban against non-Article III tribunals in private rights cases does not apply here.

*Id.* at 929-30.

97 "We do not deny that there may be basis for concern about the wisdom of large scale delegation of adjudication to magistrates." *Id.* at 930. The Third Circuit reaffirmed *Wharton-Thomas* in *Williams v. Mussomelli*. 722 F.2d 1130, 1132 (3d Cir. 1983).

98 No. 83-7938, slip op. at 1828 (2d Cir. Feb. 22, 1984).

99 Even though the technical requirements of § 636(c) were not followed, the court found that consent was freely given. *Id.* at 1831-32.

100 *Id.* at 1828-29.

101 *Id.* at 1829-30.

102 *Id.* at 1834.

hinged upon *Marathon*,<sup>103</sup> not emphasizing narrowness of the Court's ultimate holding, but the differences between the plurality opinion and the present issue.<sup>104</sup> According to the Second Circuit, the *Marathon* plurality did not mandate that only district courts render final judgments.<sup>105</sup> Instead, the *Marathon* Court demanded that article III principles not be substantially affected by the legislative court's exercise of judicial power.<sup>106</sup> According to the court, the district court control of the magistrate is an adequate alternative to article III protections.<sup>107</sup> Coupled with the litigant consent requirement, the adjunct status of the magistrate court keeps the magistrate civil trial from substantially affecting the separation of powers and the independence of the federal judiciary.<sup>108</sup>

The First Circuit has also approved the magistrate civil trial. In *Goldstein v. Kelleher*,<sup>109</sup> a diversity suit heard by a magistrate sitting with a jury,<sup>110</sup> the appellant raised the constitutionality issue, but the court of appeals found that adjunct status and litigant consent justified the magistrate civil trial.<sup>111</sup> The court reasoned that district court control preserves the interests of the judiciary, while litigant consent protects the due process rights of the parties.<sup>112</sup>

As the issue comes before the circuits, then, the courts are finding the magistrate civil trial constitutional. Still, *Pacemaker I* and the

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103 *Id.* at 1836-39.

104 *Id.*

105 *Id.* at 1840-41.

106 The court argued:

But while "ultimate decisionmaking authority" is a sufficient condition for a finding that a challenged scheme does not offend the policy of separation of powers, it is not a necessary condition for such a finding. What we must decide is whether section 636(c) impermissibly allows district judges to place magistrates under the control of the executive or legislative branches. . . . The relevant question then is whether 636(c) changes the nature of the pressures on the independence of magistrates. We find that it does not.

*Id.* See also *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1979); *Pacemaker II*, 725 F.2d at 544.

107 No. 83-7938, slip op. at 1841.

108 *Id.* at 1848-52. The consent requirement, according to the court, serves three distinct purposes: it fulfills jurisdictional prerequisites, affects the limits of permissible delegation, and provides a constraint against the complete delegation of judicial responsibilities to the magistrate.

109 No. 83-1411, slip op. at 1 (1st Cir. 1984).

110 *Id.* at 2-3.

111 *Id.* at 2-8.

112 The court concluded, "[t]he litigants' interests are safeguarded by the consensual nature of the reference; the institutional interests of the judiciary are secured by the district court's control over both the references and appointments, and by the availability of appeal to an Article III court." *Id.* at 8.



dissent in *Pacemaker II* demonstrate that the new procedure faces powerful critics. After *Marathon*, the issue is certain to continually arise. Therefore, the threshold question in a constitutional analysis of the magistrate civil trial must be whether *Marathon* controls.

## II. Constitutional Analysis of the Magistrate Civil Trial

*Marathon* determines the constitutionality of the magistrate civil trial if that opinion establishes that a legislative court, with three narrow exceptions, cannot constitutionally exercise full judicial powers. But this is not the legacy of *Marathon*. Instead, the decision produced a limited holding not directly affecting the constitutionality of the magistrate civil trial. *Marathon* may raise the issue, but it does not control the outcome.

While the *Marathon* plurality opinion encompassed the general law of legislative court jurisdiction, the holding of the Court did not.<sup>113</sup> The *Marathon* decision ultimately establishes that the jurisdiction granted to the article I federal bankruptcy court over state-based claims only peripherally related to the main bankruptcy claim is an unconstitutional delegation of article III judicial power.<sup>114</sup> This holding does not pertain to the general judicial powers of the magistrate court.

Furthermore, significant differences exist between the *Marathon* plurality opinion and the present issue. Close ties bind the magistrate court and the district court. Unlike the bankruptcy court situation in *Marathon*, the district court clearly possesses the ultimate jurisdiction through its control of the magistrate.<sup>115</sup> Indeed, the adjunct status of the bankruptcy court was the area the *Marathon* plurality seemed most willing to explore.<sup>116</sup> A further distinction is the litigant consent requirement, which marshals a new and impressive

113 See notes 68-69 *supra* and accompanying text. The Third Circuit relied upon this point in *Wharton-Thomas*. 721 F.2d at 926.

114 The Court's holding was characterized by Chief Justice Burger:

I write separately to emphasize that, notwithstanding the plurality opinion, the court does *not* hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III of the Constitution. Rather, the Court's holding is limited to the proposition stated by Justice Rehnquist in his concurrence in the judgment that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States.

458 U.S. at 92 (Burger, J., dissenting).

115 See notes 125-39 *infra* and accompanying text.

116 See note 63 *supra* and accompanying text.

line of precedent for the magistrate civil trial not applicable to the situation in *Marathon*.<sup>117</sup> In short, *Marathon* is not sufficiently analogous to control the current constitutional analysis of the magistrate civil trial. *Marathon*, therefore, is not dispositive. Still, it alerts the courts to the legitimate constitutional concerns raised by the magistrate civil trial.

The magistrate trial implicates the fundamental structural values and due process rights provided by article III. The magistrate lacks traditional article III tenure and compensation safeguards, thereby threatening the independence of the federal judiciary. Furthermore, the separation of powers may be weakened by erosion within the judicial branch due to the constant delegation of judicial authority to a legislative court.<sup>118</sup> The judiciary, through its authority to appoint magistrates, also diminishes Presidential and Congressional powers.<sup>119</sup> These are plausible, realistic concerns that affect the constitutionality of the magistrate civil trial.

Aside from broad governmental principles, there are additional problems with the magistrate civil trial. First, the magistrate is not subject to the same rigorous appointment procedure as the district court judge, a procedure designed to assure the highest quality judicial decisions.<sup>120</sup> Second, the appellate option under section 636(c) places the district judge in the unusual position of acting as an appellate court,<sup>121</sup> a position that may be especially uncomfortable if the judge helped appoint and can remove the magistrate.<sup>122</sup> Third, and

117 See notes 144-45 *infra* and accompanying text.

118 This consideration was important to the dissenting judges in *Pacemaker II*. 725 F.2d at 552-53 (Schroeder, J., dissenting).

119 The dissenting judges in *Pacemaker II* emphasized this point:

The loss of the independent exercise of judicial power, the principal check on encroachment by the legislative and executive branches, is not the only effect of the Magistrates Act on our system of government. The Act also interferes seriously with the legislative and executive checks on incursions by the judiciary.

*Id.* at 549. The statutory structure undermines the power of Congress to create judgeships, the President's power of appointment, and the Senate's power of confirmation. *Id.*

120 The magistrate is appointed by the district court judges, there is no presidential selection or Senate confirmation. 28 U.S.C. § 631(a) (Supp. V 1981); see note 29 *supra*.

121 28 U.S.C. § 636(c)(4) (Supp. V 1981); see note 46 *supra*.

122 See 1977 *House Hearings*, *supra* note 19, at 138 (testimony of Pamela S. Horowitz, legislative counsel, American Civil Liberties Union). Rep. Drinnan characterized the situation as follows:

Well, these creatures called magistrates used to be U.S. commissioners and they had a very limited role. All of a sudden they're fact-finders and they're judges. Just to put it in the concrete, I spoke to a man recently who was a litigant in a Federal court and he waited a long time before he got his day in court. He then said the presiding official wasn't even a judge; it was a magistrate. That man didn't even get

perhaps most important, litigants may be subtly coerced into a magistrate trial by both district court backload and perhaps pressure applied by the court.<sup>123</sup> Such coercion could bring about a "poor peoples' " federal court.<sup>124</sup> These are serious objections to the magistrate civil trial.

Even with *Marathon* aside, then, the magistrate civil trial raises fundamental concerns. As the circuit courts have stressed, however, two factors substantially mitigate the problems and preserve the magistrate civil trial from the fate of the bankruptcy court: the close adjunct status of the magistrate and litigant consent.

Article III court supervision of the magistrate significantly diminishes possible threats to the separation of powers and the independence of the federal judiciary.<sup>125</sup> The structure of the magistrate court assures that the district judge retains the responsibility for the administration of justice in the federal courts, which, in turn, preserves the independence of the judicial branch. This control manifests itself in several ways. The Judicial Conference, a group composed of article III judges, decides upon the number of magistrates per district and sets the magistrate's salary.<sup>126</sup> Appointment<sup>127</sup> and removal<sup>128</sup> are the province of the district courts, which also pro-

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a judge in the Federal court. The decision was adverse and he understands the futility of appealing a magistrate's decision to the judge who appointed the magistrate.

*Id.* at 63.

123 See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1047-61 (1979). The author predicts "the aggregate denial of Article III hearings to large numbers of federal litigants" when poorer litigants are coerced into the magistrate court. *Id.* at 1050. "[The] denial will appear illusory on the individual level, since any litigant tapped by the district court for reference might choose instead to 'purchase' a constitutional judge by accepting the attendant waiting costs and forcing his adversary to do likewise." *Id.* The same concern influenced the dissenting judges in *Pacemaker II*: "it ignores reality to suppose that at least some busy district courts will not control their dockets by pressuring litigants to consent to trial before a magistrate." 756 F.2d at 554 (Schroeder, J., dissenting); see also 1977 House Hearings, *supra* note 19, at 112-14 (statements of Hon. Robert J. Drinnan).

124 Note, *supra* note 123, at 1052.

125 This conclusion has been reached by commentators and the circuit courts. See, e.g., *Goldstein*, No. 83-1411 slip op. at 8; *Collins*, No. 83-7938 slip op. at 2839-43; *Pacemaker II*, 725 F.2d at 927-30; *Wharton-Thomas*, 721 F.2d at 927-30; 1977 House Hearings, *supra* note 19, at 111-12 (testimony of Hon. Joseph D. Tydings); McCabe, *supra* note 19, at 365-74.

126 "The conference shall determine, in light of the recommendations of the Director, the district courts and the councils, the number of full-time United States magistrates, and part-time magistrates, the locations at which they shall serve, and their respective salaries." 28 U.S.C. § 633(b) (Supp. V 1981).

127 28 U.S.C. § 631(a) (Supp. V 1981).

128 28 U.S.C. § 631(i) (Supp. V 1981).

mulgate the rules under which the magistrate operates.<sup>129</sup> The district court enforces magistrate orders,<sup>130</sup> and contempt of the magistrate is contempt of the district court.<sup>131</sup> Finally, the magistrate uses the district court's clerk and calendar.<sup>132</sup>

This district court supervision of the magistrate system assures that the performance of the district court's essential constitutional role is not impaired by the magistrate civil trial. The statutory scheme insulates the magistrate from the direct influence of the other branches of the federal government, the state governments, and private individuals.<sup>133</sup> The magistrate is dependent upon the district court, not the legislative or judicial branch, or any outside authority. Again, article III judges themselves appoint the magistrates and determine their number. This district court supervision should thwart the dilution of article III court powers and the degrading of their status.<sup>134</sup> The extra measure of control maintained by the district court over the magistrate civil trial reinforces this conclusion.

While section 636(c) expands the judicial powers of the magistrate, it also increases district court control over the litigation, without increasing congressional or executive control over the magistrate.<sup>135</sup> The magistrate can hear civil cases only if the district court so designates.<sup>136</sup> The court also retains the authority to vacate a magistrate reference for good cause,<sup>137</sup> which can include the nature and precedential value of the case.<sup>138</sup> The appellate option in-

129 28 U.S.C. § 636(b)(4) (Supp. V 1981).

130 28 U.S.C. § 636(e) (Supp. V 1981).

131 28 U.S.C. § 636(e) (Supp. V 1981).

132 Motions before the federal magistrate are filed through the district court clerk; there are no special provisions for magistrate civil trials. *See* FED. R. CIV. P. 3.

133 McCabe, *supra* note 19, at 365-74; *Pacemaker II*, 725 F.2d at 544-45; *Wharton-Thomas*, 721 F.2d at 927-30.

134 Concerning the influence the district judge can have upon the magistrate, the Third Circuit in *Wharton-Thomas* reasoned that since the mandatory district court review of the magistrate's case recommendations was constitutional, the much lesser influence the district court exercises through the appellate provisions of § 636(c) is constitutional. 621 F.2d at 927. Furthermore, the court stated that "[t]here is no reason to even speculate that district judges would improperly attempt to influence a magistrate's decisions, but any such conduct would implicate due process, rather than Article III." *Id.* at 927 n.8.

135 Instead, the responsibilities of delegation and administration lie with the Judicial Conference and the district courts. While this does affect the appointment and confirmation powers of the other branches of the federal government, as the dissenters pointed out in *Pacemaker II*, this situation exists in all the other judicial functions performed by the federal magistrate and has not been judged a substantial interference with the separation of powers.

136 28 U.S.C. § 636(c)(1) (Supp. V 1981).

137 28 U.S.C. § 636(c)(6) (Supp. V 1981).

138 Although there has been no litigation concerning the statutory term "for good cause," Congress stated that, "[t]his removal power is to be exercised only where it is appropriate to

creases district court control by allowing the court to review a case on the record.<sup>139</sup> But while district court supervision of the magistrate system and the magistrate civil trial is an important mitigating factor, litigant consent is crucial.

The consent requirement assures that litigants are not denied their right to an article III tribunal.<sup>140</sup> Instead, they freely exercise their option for the sake of judicial efficiency and with confidence in the magistrate.<sup>141</sup> This prerequisite to the magistrate civil trial also helps justify the broadened jurisdiction of the magistrate<sup>142</sup> and puts a natural restraint on the wholesale delegation of judicial powers to a magistrate court.<sup>143</sup> But most significantly, litigant consent places the constitutionality of the magistrate civil trial in a different light, for it introduces an impressive line of supporting precedent.<sup>144</sup> Furthermore, it severs the present issue from unsupportive precedent, including *Marathon*, that restricted the powers of legislative courts.<sup>145</sup>

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have the trial before an article III judicial officer because of the extraordinary questions of law at issue and judicial decisionmaking is likely to have wide precedential importance." 1979 Senate Report, *supra* note 2, at 14.

139 28 U.S.C. § 636(c)(9) (Supp. V 1981); see McCabe, *supra* note 19, at 366-69.

140 See Goldstein, No. 83-1411 slip op. at 5-8; Collins, No. 82-7938 slip op. at 1845-52; *Pace-maker II*, 725 F.2d at 542-47; *Wharton-Thomas*, 721 F.2d at 926-30; 1979 Senate Report, *supra* note 2, at 4, ("in light of this requirement of consent no witness at the hearings on the bill found any constitutional question that could be raised against the provision"); see also McCabe, *supra* note 19, at 374-79; 1977 House Hearings, *supra* note 19, at 182-86 (testimony of Daniel J. Meador, Assistant Attorney Gen., Justice Dep't).

141 McCabe, *supra* note 19, at 374. The amendment contains provisions assuring the voluntariness of litigant consent, 28 U.S.C. § 636(c)(2) (Supp. V 1981), and Congress has emphasized this point, 1979 Senate Report, *supra* note 2, at 5.

142 Collins, No. 82-7938 slip op. at 1850-51.

143 *Id.* at 1851.

144 Analogous situations in which litigants have validly waived their constitutional trial rights include: right to jury trial, *Patton v. United States*, 281 U.S. 438 (1930); special master hearings, *Kimberly v. Arms*, 129 U.S. 512 (1889); self-incrimination, *Garner v. United States*, 424 U.S. 648 (1976); unreasonable searches and seizures, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); and speedy trial, *Barker v. Wingo*, 407 U.S. 514 (1972). The pre-1979 district court experiments with the magistrate civil trial were held constitutional by the courts largely due to the litigant consent requirement. See *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352 (5th Cir. 1980); *Banks v. United States*, 614 F.2d 95 (6th Cir. 1980); *Muhick v. Allen*, 603 F.2d 1247 (7th Cir. 1980); *DeCosta*, 520 F.2d at 499. Mandatory de novo review by the district courts also played an important part in these earlier decisions.

145 Earlier restrictive holdings on the magistrate's judicial power did not involve the crucial element of litigant consent. See *Mathews v. Weber*, 423 U.S. 261 (1976) (concerning the mandatory appeal of social security decisions to the magistrate); *Raddatz*, 447 U.S. 667 (concerning the automatic reference of a suppression motion to a magistrate). The Third Circuit stated in *Wharton-Thomas*:

[A]lthough all three Supreme Court decisions emphasized that final decision-making authority rests in an Article III court, they did so in circumstances where the non-Article III officer was forced on the parties. *Weber*, *Raddatz*, and *Northern Pipe-*

Neither the litigant consent requirement nor district court supervision of the magistrate alone would sufficiently address the article III concerns generated by section 636(c).<sup>146</sup> Even though the district court closely supervises the magistrate, litigants cannot be automatically denied access to an article III court.<sup>147</sup> Conversely, litigants may freely consent to a magistrate trial, but if the ties between the district court and the adjunct are weak, fundamental constitutional principles may be violated.<sup>148</sup> Only in the combination of litigant consent and adjunct status does an adequate substitute for article III protections emerge.

The more practical problems with the magistrate civil trial should not change this conclusion. These objections, while real and serious, address the wisdom of the legislation and not its constitutionality. In the face of clear Congressional intent and the proper restrictions upon judicial review, the burden of proving unconstitutionality is greater than any of these objections. For example, there is a possibility of subtle coercion in obtaining litigant consent to the magistrate trial; however, the chance for judicial coercion exists in other aspects of federal litigation that are, nonetheless, clearly constitutional.<sup>149</sup> The same argument applies to the appellate review and appointment provisions; they ultimately are leveled at the wisdom of the legislation and not its basic constitutionality. These problems were recognized by Congress and now by the circuit courts, but they have not rendered the magistrate civil trial unconstitutional.<sup>150</sup>

### III. Possible Modifications to the Magistrate Civil Trial

Increased district court control over the litigation before the magistrate could minimize constitutional concerns and alleviate vari-

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*line* can be read as establishing that the decision making power must remain in the Article III district court when the parties have not consented to a determination by a non-Article III office. The cases do not provide a determinative principle in instances of consensual reference.

721 F.2d at 928. On the difference litigant consent makes in the *Marathon* decision, see note 114 *supra* and accompanying text.

146 No recent decision upholding the constitutionality of the magistrate court trial relies solely upon one of these bases. See notes 79-112 *supra* and accompanying text.

147 See note 15 *supra* and accompanying text.

148 See notes 8-14 and 118-19 *supra* and accompanying text.

149 *Wharton-Thomas*, 721 F.2d at 976. Furthermore, since all litigants, including wealthy corporations and individuals, stand to benefit from the efficiency of a magistrate civil trial, the evolution of a "poor peoples'" federal court seems improbable.

150 Both provisions were debated during the congressional hearings. See 1977 House Hearings, *supra* note 19, at 53-198; 1979 Senate Hearings, *supra* note 18, at 1-76.

ous practical defects in the magistrate civil trial.<sup>151</sup> An increase in district court control, however, decreases the overall efficiency of the system; efficiency provides increased access to the federal system, the primary advantage of the magistrate civil trial.<sup>152</sup> Any modification to the 1979 amendment must successfully balance these factors.

Presently, the district court designates the magistrate to hear civil cases in general.<sup>153</sup> This general grant could be altered to designation on a case by case basis, with a corresponding increase in district court supervision of the litigation. More court time would be expended, but when the case is designated for a magistrate civil trial, the bulk of litigation time still would be spent before the magistrate. The modification would preserve the benefits of the present system, while assuring a greater measure of article III court control.<sup>154</sup> But case by case designation is only one way to achieve these ends.

The *Marathon* plurality intended to prohibit non-article III courts from rendering final judgments.<sup>155</sup> Should the Supreme Court adopt this more stringent approach to legislative court jurisdiction, the problem could be solved by instituting a "magistrate's judgment" in lieu of a formal binding judgment.<sup>156</sup> While the litigation itself takes place before the magistrate, the district court would bear the responsibility for issuing the final judgment. This is not an evasive device, but a way to increase district court control by making review of the magistrate trial proceedings automatic. This modification would be especially potent if combined with case by case designation. Thus the procedure could be saved from constitutional peril, the quality of magistrate decision-making better assured, and the essential purposes of the magistrate civil trial retained.

Should case by case designation and the "magistrate's judgment" not be acceptable, a close substitute would be de novo review by the district court. At present, the district court reviews the case on the record.<sup>157</sup> With de novo review, the district court would,

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151 See *Wharton-Thomas*, 721 F.2d at 930 ("[W]e do not deny that there may be basis for concern about the wisdom of large scale delegation of adjudication to magistrates.").

152 See 1979 Senate Report, *supra* note 2, at 1.

153 28 U.S.C. § 636(c)(1) (Supp. V 1981).

154 Case by case designation was proposed in the original bill. See Note, *supra* note 123, at 105. But Congress believed that such designation could lead to only certain types of cases being heard by the magistrate. See 1979 Senate Report, *supra* note 2, at 18. In the balance, the risk of such wrongful use of the magistrate does not outweigh the gain to be had in improved district court control of the litigation before the magistrate judge.

155 See notes 49-67 *supra* and accompanying text.

156 The idea originated in McCabe, *supra* note 19, at 379.

157 28 U.S.C. § 636(c)(4) (Supp. V 1981).

when functioning in its appellate capacity, make its own determinations concerning the aspects of the magistrate's decision to which the appellant objects. While de novo review is more time consuming than review upon the record, it would pertain only to cases on appeal. Furthermore, since it may make the magistrate civil trial more appealing to litigants, de novo review could contribute to the overall efficiency of the federal court system.<sup>158</sup>

If none of the above modifications are introduced, litigants choosing the district court appellate option under section § 636(c) should at least be given a further right of appeal to the circuit court. This would strengthen article III court control and would check conflict of interest in the district court review of its magistrate.

None of these suggestions should seriously hamper the efficiency of the magistrate civil trial. They will, to varying degrees, increase district court control over the litigation. This improves the procedure and makes it even more attractive to litigants.

One possible modification, however, should not be adopted: the granting of article III status to the magistrate.<sup>159</sup> While this is a possible solution to the bankruptcy court conundrum,<sup>160</sup> it would defeat the very idea behind the magistrate civil trial, which is to increase access to the federal courts by utilizing a more flexible and less expensive judicial officer than the traditional article III judge.<sup>161</sup> Simply increasing the number of federal judges deprives the federal courts of a unique tool useful in addressing the heavy caseload and changing needs of the federal judiciary.

#### IV. Conclusion

Practitioners have welcomed the magistrate civil trial as a means to ameliorate the traditional difficulties of bringing suit in federal court. The procedure could not be justified, however, if it threatened the separation of powers and the independence of the federal judiciary. To avoid this result, Congress has incorporated two substitutes for traditional article III protections: district court supervision and litigant consent. Both preserve constitutional values, yet maintain the flexibility and low cost of the magistrate system.

While the magistrate civil trial may need improvement, it is

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158 The *Pacemaker II* court found the idea of de novo review, while not constitutionally required, nonetheless advantageous. 725 F.2d at 546.

159 *Id.* at 555 (Pregerson, J. dissenting).

160 See Levit & Mason, *supra* note 48, at 357-58.

161 See *Pacemaker II*, 725 F.2d at 547; 1979 *Senate Report*, *supra* note 2, at 4-5; McCabe, *supra* note 19, at 380-90.



nonetheless a constitutional procedure. Indeed, by increasing access to the federal courts system while simultaneously lessening the district court caseload, the magistrate civil trial has already substantially contributed to the justice system. The circuit courts which have considered the issue have found this innovative procedure consistent with article III. Their conclusion should prevail when the constitutionality of the magistrate civil trial is ultimately resolved.

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